IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

—against—

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Constitutional Provisions and Statutes Involved

In addition to the statutory provision set forth by the Appellants, several provisions of the Constitution of the United States are directly relevant to this action. Insofar as pertinent, they are here set forth:

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

United States Constitution, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment XIV:

". . . [N]o State shall make or enforce any law which shall abridge the privileges or imunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Did the District Court correctly conclude:

   (a) That a case or controversy, ripe for adjudication, has been presented?

   (b) That the Appellees Population Planning Associates and Rev. James B. Hagen have standing to challenge New York State Education Law §6811(8)?

2. May a State, consistently with the Constitution,

   (a) Wholly proscribe the distribution of nonprescription contraceptives, except by physicians, to persons under the age of sixteen years?

   (b) Proscribe the distribution of nonprescription contraceptives to all persons, except through licensed pharmacists or physicians?

3. May a State, consistently with the Constitution, totally proscribe the dissemination of any form of advertisement or display concerning nonprescription contraceptives?

Statement of the Case

This is an appeal from a unanimous decision of a three-judge district court, of the Southern District of New York,[1] which held that §6811(8) of the New York Education Law is unconstitutional. That statute prohibits substantially all distribution of nonprescription contraceptives to persons under the age of sixteen years; prohibits the distribution of such contraceptives to persons over the age of sixteen, except by licensed pharmacists and physicians; and totally bans the dissemination of all advertising information or displays concerning such products. Violation of the law subjects the offender to criminal penalties.

The statute, passed in its present form in 1965, originally appeared as §1142 of the Penal Law, was then recodified as §6804-b of the Education Law, and in 1971 was again recodified into its present form. Although there have been no prosecutions reported under the present statute, a number were reported under its predecessors, the most recent occurring in 1965.

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[1] Composed of Friendly, Circuit Judge, and Pierce and Conner, District Judges.

The Appellees are individuals and organizations affected in significant ways by the statute's prohibitions. The three-judge court found that two of these Appellees, Population Planning Associates (hereinafter "PPA"), and the Rev. James B. Hagen (hereinatfer "Hagen"), had standing, and it therefore did not reach the question as to whether the other plaintiffs had standing.[2]

PPA is a North Carolina corporation conducting business in New York, which, *inter alia,* engages in the retail mail order sale of nonprescription contraceptive products. In response to advertisements placed by PPA in periodicals circulating within the State of New York (e.g., 20a),[3] PPA was contacted on three different occasions by representatives of the Appellant Board of Pharmacy of the State of New York. On December 1, 1971, a letter from the

[2] The other plaintiffs in the court below were Population Services International (PSI), Drs. Anna T. Rand, Edward Elkin, and Charles Arnold (the Doctors), and John Doe. PSI is a North Carolina nonprofit corporation with an office in the City, County and State of New York. Its objectives include the discovery and implementation of new methods of delivering contraceptive services and information to persons not receiving them, with the goal of reducing the miseries of unwanted pregnancies, disease and population growth. PSI wishes to be able to implement programs in New York for the distribution of nonmedical contraceptives through outlets other than licensed pharmacies. The Doctors are physicians active in family planning, pediatrics, obstetrics and gynecology. They treat sexually active adolescents both over and under the age of sixteen, and they advocate the distribution of nonprescription contraceptives through nonmedical and nonpharmacy outlets. John Doe is an adult male resident of New York State, whose access to contraceptive information and products, and whose freedom to distribute the same to his children under the age of sixteen, are prohibited by the statute here challenged.

[3] References to a page number followed by "a" indicate references to the Appendix filed in this Court.

References to "J.S." indicate references to the opinion of the court below, as reproduced in Appendix A to the Jurisdictional Statement filed in this Court by the Appellants.

Appellant Sica, Executive Secretary of the Board of Pharmacy, stated that PPA was in violation of Education Law §6811(8), for having placed an advertisement in a college newspaper, allegedly soliciting "the sale of condoms to students." The letter demanded "future compliance with the law" (18a, J.S. 5a). A second letter, dated February 23, 1973, asserted that PPA's efforts to sell male nonprescription contraceptives through magazine advertisements were unlawful, and warned that, "In the event you fail to comply the matter will be referred to our Attorney General for legal action" (19a, J.S. 5a). Lastly, on September 4, 1974, after the commencement of this action, PPA's New York office was visited by inspectors from the Board of Pharmacy. PPA's president was told to stop selling contraceptives because such sale was in violation of the law. The inspectors further warned PPA that its violations of the law would be reported to the Board of Pharmacy, and such a report was indeed made, and a copy left with PPA (21a-23a, J.S. 5a). While Appellants now maintain that the latter inspection was "for informational gathering purposes only" (Appellants' Brief, p. 6), the court below specifically found that the inspectors threatened to report PPA to the Board of Pharmacy (J.S. 5a), a threat which was tantamount to a threat of prosecution.

Hagen, too, has regularly engaged in conduct forbidden by the statute. As an ordained Episcopal minister and rector of a church in a poor neighborhood in Brooklyn, New York, Hagen has acted as coordinator of the Sunset Action Group Against V.D., a group which sells and distributes male nonprescription contraceptive products to persons both over and under the age of sixteen, both at the church and through a retail outlet which is not a licensed pharmacy (J.S. 4a, 7a-8a).

The court below found that §6811(8) unquestionably interfered with access by New York State residents to nonprescription contraceptives, and to information about them. The court further held such access to be an aspect of the constitutionally protected right to privacy of New York's citizens, which PPA and Hagen had standing to represent. The court did not, however, find it necessary to determine whether the rights so infringed were "fundamental" rights, so that the infringement might be upheld only under a showing of compelling State interest. Rather, the District Court, as to each of the statute's prohibitions, reviewed the asserted interest of the State in maintaining those prohibitions, and was able to find no rational connection at all with any interest which the State might permissibly seek to further by the statute.

Accordingly, the court below granted judgment to the Appellees, declaring §6811(8) of the New York State Education Law to be violative of the Constitution and granting injunctive relief against enforcement of the statute (J.S. 27a).

Summary of Argument

1. The Appellees present a case or controversy. The criminal statute here challenged directly operates against PPA and Hagen, and PPA has several times been threatened with prosecution. Moreover, there have been a number of prosecutions under the statute, and the State Legislature, by refusing to amend or repeal the statute, has evidenced the State's continuing interest in maintaining its prohibitions.

PPA and Hagen have standing. Their own First Amendment rights have been abridged by this statute. Moreover, the rights of third parties which PPA and Hagen raise here as advocates, may only be vindicated in this manner, because the challenged statute does not forbid use of contraceptives or receipt of information about them, but merely the distribution of either. Further, because of the intimate nature of the rights involved, contraceptive users are chilled and embarrassed to step forward in their own behalf.

2. The constitutional right of privacy includes the fundamental right of access to contraceptives. The right of privacy protects the individual from improper governmental intrusion into fundamentally personal decisions relating to the right to engage in sexual intercourse, and the right to determine whether or not to procreate. This right has been held by this Court to include the right to use contraceptives, a right which would be utterly meaningless unless it carried with it the right of access to contraceptives. The right of access is no less fundamental than the right to use, and only a compelling State interest may justify its infringement. No portion of this statute is rationally related to any legitimate State concern—much less supported by a compelling State interest.

3. The statutory bar on distribution of nonprescription contraceptives save by licensed pharmacists or physicians unconstitutionally burdens the right to obtain such contraceptives. The State's purported "administrative convenience" in enforcing the remainder of the statute (also constitutionally infirm) is not a constitutionally sufficient reason for the abridgement of fundamental rights. The

alleged knowledgeability and expertise of pharmacists in this area, even if it exists, is irrelevant and unnecessary. No health considerations are involved. The desire to avoid having young people sell contraceptives is not a legitimate State interest and even if it were, far less restrictive means of reaching this result are readily conceivable.

4. The statute violates the constitutional rights of minors by unduly infringing their access to contraceptives. Minors may not be denied fundamental constitutional rights solely on the basis of age. Minors who engage in sexual intercourse, no less than adults, are desperately in need of the protection afforded by access to contraceptives, for the same miseries of unwanted pregnancy, childbirth, abortion, and venereal disease befall minors as easily as adults, with consequences which are, if anything, still more terrible. The deterrence of sexual activity among the young, even if the State may indirectly legislate in this fashion, manifestly has no proven or provable relation to the statute. There is no rational reason—as the State has conceded—to believe that hindering minors in their right of access to contraceptives deters them at all from sexual intercourse. Where a statute burdens the exercise of a constitutional right, and not only does not further the purported State interest or help any of those who are subjected to it, but in fact visits terrible harm upon them, it cannot stand.

5. The total prohibition of display or advertisement of nonmedical contraceptives is an unconstitutional prior restraint in violation of the First Amendment, as well as an unconstitutional burden upon the right to use and distribute such contraceptives. The State's claim that the

speech involved is "commercial" and thus unprotected, if it ever had any weight, is plainly now foreclosed by this Court's most recent decisions. Protected speech is no less protected because it may possibly be offensive to some people. A purported interest in regulating morality cannot justify this violation of this First Amendment. In any event, the State cannot demonstrate that limiting access to information about contraceptives will deter illicit sex.

Finally, the statute is overbroad, for it limits any publication whatsoever of information regarding contraceptives.

POINT I

The Court below was correct in finding that Appellees have standing, and that a case or controversy is presented.

The Appellants urge this Court to hold that the court below erred in its holding that the Appellees Population Planning Associates and Hagen have presented a justiciable case or controversy, and that they have standing to assert the claims presented. It is respectfully submitted that the decision of the District Court was entirely correct in this regard, and should be affirmed; indeed, this Court's own rulings subsequent to the decision of the District Court only lend further support to the conclusions of the latter.

The Appellees, as noted, seek to assert *both* their own First Amendment rights, of the advocacy, advertising, display and distribution of nonprescription contraceptives, all of which are forbidden by the criminal statute here under attack, and the First Amendment and privacy rights of others who are not parties to this action—residents of

New York State who are intolerably burdened in their access to contraceptives and contraceptive information.

A. *A Case or Controversy Is Presented.*

The primary thrust of the Appellants' assertions is that the Appellees have presented no case or controversy, a contention which on its face is wholly without merit. Thus, Appellants contend (Appellants' Brief, p. 10), perhaps somewhat disingenuously, that there have been no prosecutions under New York Education Law §6811(8), and that this case is therefore governed by this Court's holding in *Poe* v. *Ullman,* 367 U.S. 497 (1961). The latter case, however, concerned a Connecticut statute which plainly was wholly moribund, for the State of Connecticut had clearly evidenced a complete lack of intention to enforce the law, and the plaintiffs were able to demonstrate only a single, abortive attempt to enforce the statute in the more than three-quarters of a century since its enactment. Here, by contrast, as the Appellants wholly omit to inform this Court, there have indeed been a number of prosecutions under the almost identical predecessor to the present statute, former §1142 of the Penal Law; these have occurred as recently as 1965.[4] If a State could escape judicial review of the constitutionality of its statutes by no more than the simple device of recodification, and an assertion that there had been no prosecutions under the newly codified statutes, the result would be no less than farcical.

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[4] *People* v. *Baird,* 47 Misc.2d 478, 262 N.Y.S.2d 947 (Sup. Ct. Nassau Co. 1965); *People* v. *Sanger,* 222 N.Y. 192, 118 N.E. 637 (1918), *app. dism.* 251 U.S. 537 (1919); *People* v. *Byrne,* 99 Misc. 1, 163 N.Y.S. 682 (Sup. Ct. Kings Co. 1917). See also Op. Atty. Gen., 45 St. Dept. 308 (1932) (sale of prophylactics in coin machine illegal under § 1142).

The Appellants' arguments, moreover, are blatantly inconsistent. They strenuously seek to convince this Court, in Point I of their Brief (pp. 9-11), that the statute, if not moribund, is on its deathbed, and that the likelihood of prosecution is nil. Elsewhere, however, they argue no less strenuously in support of what they maintain are the State's numerous and compelling interests in maintaining and enforcing the very same statute, and that the statute has been repeatedly reaffirmed by the State Legislature, despite numerous attempts at amendment or repeal.

Should any doubt remain as to the State's continuing interest in the enforcement of this legislation, such doubts are wholly removed by the repeated communications which PPA has received from the Appellant Sica, Executive Secretary of the Appellant State Board of Pharmacy, and from other representatives of the Board. In both the letters received by PPA, and in the so-called "information gathering" visit by an inspector of the Board of Pharmacy, PPA was directly put on notice that the Appellants believed PPA to be acting in violation of State law, and one of the letters directly threatened "legal action" (18a, 19a, 21a). Such continuing threats make it plain that " . . . the challenged governmental activity in the present case . . . by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of" the Appellees. *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, at 122 (1974). Moreover, as this Court has noted,

> "[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless [federal] plaintiff between the Scylla of

intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel* v. *Thompson,* 415 U.S. 452, at 462 (1974).

The Appellees here have been placed by the State of New York in exactly the center of that dire strait.

In such circumstances, the Appellants' claim that there is no justiciable controversy is wholly without merit, and is wholly at odds with numerous holdings of this Court, reaffirmed as recently as last Term, which recognize that actual prosecution under a challenged criminal statute is not essential to the presentation of a case or controversy. Thus, in *Doe* v. *Bolton,* 410 U.S. 179, at 188 (1973), this Court found that the doctor plaintiffs

"... also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes operate directly ... The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

Indeed, in *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), this Court found no barrier to standing despite a total absence of prosecutions for the nearly forty years that the challenged statute had existed.

As the lower courts have recognized, "Under *Bolton* ... all that is required for justiciability and standing is that the criminal statute directly operate against the party seeking relief." *Associated Students, U. of Cal. at Riverside* v. *Attorney General,* 368 F. Supp. 11, at 19 (C.D. Cal. 1973). See also *Friendship Medical Center, Ltd.* v. *Chicago Bd. of Health,* 505 F.2d 1141 (7th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975), where the court held the appellant physicians to have standing even though they were *in compliance* with the challenged statute, because of the statute's continuing effect in enforcing compliance through a fear of prosecution.

Indeed, just this past Term, the Court found standing for physicians performing abortions, to challenge a Missouri statute which made the performance of certain abortions a misdemeanor; without even pausing to consider the likelihood of prosecution, the Court held that the physician was the one against whom the act directly operated, and that therefore the physician asserted a sufficiently direct threat of personal detriment to present a justiciable controversy. *Planned Parenthood of Central Missouri* v. *Danforth,* —— U.S. ——, 96 S. Ct. 2831 (1976). See also *Singleton* v. *Wulff,* —— U.S. ——, 96 S. Ct. 2868 (1976), in which, although the Court divided over the question of whether the physician plaintiffs were the proper proponents of the particular rights which they asserted, there was unanimous agreement with Part IIA of Mr. Justice Blackmun's opinion, that they alleged sufficient injury in fact to constitute a case or controversy, a conclusion which, the Court held, "needs little comment for there is no doubt now that the appellee-physicians suffer concrete injury.... If the physicians prevail ..., they will

benefit. . . . The relationship between the parties is classically adverse. . . ." —— U.S. at ——, 96 S. Ct. at 2873.

Similarly, in the present case, the Appellees PPA and Hagen "suffer concrete injury" at the hands of this statute, and if they prevail, they will directly benefit, both financially, and in being freed of the fear of criminal prosecution for partaking in constitutionally protected activites. As in *Singleton,* the relationship between Appellants and Appellees here is "classically adverse," and a case or controversy, ripe for adjudication, has unquestionably been presented.

The Appellants' contrary assertion is clearly erroneous, and their reliance on such cases as *Golden* v. *Zwickler,* 394 U.S. 103 (1969), and *Watson* v. *Buck,* 313 U.S. 387 (1941), is plainly misplaced. In *Golden,* the obstacle to adjudication was essentially mootness; the particular election in which the plaintiff desired to conduct what he contended was constitutionally protected leafletting activity had passed, and the plaintiff made no clear showing as to whether, when, or how he might wish to engage in such activity in the future. Here, by contrast, the Appellees PPA and Hagen have engaged continuously in the prohibited conduct, and have every intention of continuing to do so. The citation of *Watson* v. *Buck* is still further misplaced, even aside from its great age, for the case involved a broad challenge to a newly-enacted, lengthy and complex statute, never interpreted by the State's own courts, and as to which there was no real showing of any likelihood of enforcement at all.

This case, however, presents no such infirmity. The Appellees have engaged and continue to engage in a course

of conduct for which they face prosecution by the State, and they have been threatened with such prosecution, under a statute whose meaning is all too clear. The relationship between the parties is "classically adverse," and there is no obstacle to adjudication of this case.

B. *The Court Below Correctly Held That Appellees PPA and Hagen Have Standing.*

Just as there can be no doubt that a sufficiently justiciable case or controversy has here been presented, there can equally be no doubt that the Appellees PPA and Hagen are proper parties to assert the claims which are sought to be vindicated by this action—both the rights of these Appellees themselves, and the rights of those third parties, residents of New York State, who suffer intolerably severe adverse consequences from the continued enforcement of the challenged statute. Indeed, Appellants do not appear very seriously to dispute that PPA and Hagen are proper parties to assert these claims, nor could they reasonably challenge such a contention, for the District Court's holding on this issue was eminently correct.[5]

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[5] The court below, as noted, did not pass on the standing of the Appellees PSI, Doctors and John Doe. It is evident, however, that they too have standing. PSI seeks to distribute contraceptives and information about such products and is barred from doing so by Education Law § 6811(8), which "directly operates" against it. The Doctors are similarly hampered in distributing contraceptives and information, and in their advocacy of the availability of contraceptives in nonmedical and nonpharmaceutical places. Thus, both as "advocates" and as parties against whom the statute's criminal prohibitions directly operate, all of these Appellees have standing. John Doe is himself hindered in his access to contraceptives and information, and is proscribed from giving the same to his minor children; these direct prohibitions on his own constitutionally protected activities clearly give standing to Doe.

First, of course, it is plain that in several respects, the statute operates directly to abridge the First Amendment rights of these Appellees themselves, to advertise and otherwise disseminate information concerning contraceptives. As to these rights, there can hardly be any doubt of the standing of PPA and Hagen to assert their own claims. *See,* e.g., *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809 (1975); *Procunier* v. *Martinez,* 416 U.S. 396 (1974); *New York Times Co.* v. *United States,* 403 U.S. 713, at 749 (1971) (Burger, C.J., dissenting); *Griswold* v. *Connecticut,* 381 U.S. 479, at 482-3 (1965); *Gajon Bar & Grill* v. *Kelly,* 508 F.2d 1317 (2d Cir. 1974).

Second, as has long been established under this Court's decisions, it is entirely proper, in appropriate circumstances, for plaintiffs to represent the constitutional rights of third parties who are not themselves before the Court. *See,* e.g., *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); *Barrows* v. *Jackson,* 346 U.S. 249 (1953). The standards which this Court has developed for such advocacy of third-party rights, particularly in cases falling under the general rubric of "privacy" litigation, are plainly satisfied by PPA and Hagen.

Thus, in *Griswold* v. *Connecticut, supra,* where the petitioners were the Executive Director of Planned Parenthood of Connecticut and a physician, both of whom had been convicted of dispensing contraceptives to married persons in violation of Connecticut statute, this Court permitted the petitioners to assert the constitutional rights of the recipients of the contraceptives, finding it persuasive that "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind

of confidential relationship to them." 381 U.S. at 481. Similarly, in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), Baird, a distributor who was not a physician or otherwise part of any traditional confidential relationship with the recipients of contraceptives, was permitted to assert the rights of the recipients, in part because of the Court's finding that

> "[T]he relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." 405 U.S. at 445.

As the court below found, "[L]ike Baird, plaintiffs PPA and Hagen are advocates of the privacy rights of those they seek to represent. They advocate the increased availability of nonprescription contraceptives to those whose ability to obtain them is impaired by §6811(8)." (J.S. 7a).

The contrary assertion of the Appellants (Appellants' Brief, p. 11) is wholly baseless, in contending that PPA is not a proper plaintiff because "The interest of PPA in this litigation is purely commercial, purely those of a seller as opposed to the interests of Baird who was a genuine advocate of the rights of the unmarrieds in the State of Massachusetts." Appellants simply omit any mention whatever of the District Court's aforementioned finding, which is fully supported by the record. Moreover, even if there were some support for the Appellants' assertion that PPA's interests are "purely commercial," the relevance of any such argument is wholly destroyed by this Court's decisions in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* —— U.S. ——,

96 S. Ct. 1817 (1976) and *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975).

In addition to the advocacy role of PPA and Hagen, this case presents another element which was present in *Eisenstadt*, and which this Court found to be an even more compelling reason to recognize Baird's standing to represent the rights of others:

> "[M]ore important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests . . . [T]he case for according standing to assert third-party rights is stronger in this regard here than in Griswold because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights. . . . The Massachusetts statute, unlike the Connecticut law considered in Griswold, prohibits, not use, but distribution." 405 U..S. at 445-6 (footnotes omitted).

In the present case, likewise, New York's statute does not place any direct proscription on the use of contraceptives, but only on their distribution. Accordingly, users or potential users of contraceptives may well be denied any forum to assert their own rights, and standing to represent them should therefore be granted, as in *Eisenstadt*, to those against whom the statute does operate.

Again, this Court's most recent decisions concerning the assertion of the rights of third parties, particularly in

the area of privacy, lend further support to the contentions of the Appellees. Thus, in *Planned Parenthood of Central Missouri* v. *Danforth*, —— U.S. ——, 96 S. Ct. 2831 (1976), as in *Doe* v. *Bolton*, 410 U.S. 179 (1973), the fact that the challenged criminal statutes operated directly against the physician plaintiffs gave assurance that those plaintiffs would have the requisite interest in asserting the rights of third parties, and they were permitted to do so.

Similarly, in *Singleton* v. *Wulff*, —— U.S. ——, 96 S. Ct. 2868 (1976), although the Court divided over whether the plaintiffs there could properly assert third party interests, in challenging not a criminal statute, but a provision which rendered the performance of most abortions ineligible for Medicaid benefits, the language of each of the three opinions indicates support for the standing of PPA and Hagen in this case. Thus, Mr. Justice Blackmun's prevailing opinion suggested that standing should be found where the enjoyment of the right asserted is inextricably bound up with the activity which the litigant wishes to pursue, and is thus necessarily affected by the outcome of the litigation, and there is serious doubt whether the third parties will be able themselves to assert the rights at issue. —— U.S. ——, 96 S. Ct. at 2874. Plainly, in this case, the right of access to contraceptives, and to information about them, is inextricably bound up with the ability of the Appellees and others to distribute such contraceptives and information. Just as plainly, serious impediments exist to the assertion of their own rights by the third parties who will be affected, for, as noted, §6811(8) does not operate directly against those persons at all; moreover, many of the very persons to whom PPA has sought to appeal in its advertising, and whom it has sought to assist, are those desiring the pri-

vacy and confidentiality of purchasing contraceptives by mail, and therefore less likely to be willing or able to bring suit themselves (see 20a, 37a, 39a, 40a).

Appellees PPA and Hagen also satisfy the test advanced by Mr. Justice Stevens in his concurring opinion, —— U.S. at ——, 96 S.Ct. at 2877, that where the plaintiffs themselves have a financial stake in the outcome of the litigation, and they assert that the statute impairs their own constitutional rights, they should also be permitted to present arguments based on the statute's effect on the constitutional rights of others.

Finally, the concurring and dissenting opinion of Mr. Justice Powell, joined by the Chief Justice and Justices Stewart and Rehnquist, sets forth a test also satisfied by the Appellees here. Thus, Mr. Justice Powell based his disagreement with the Court's finding of standing on the fact that the State of Missouri had not *forbidden* the performance of abortions, but had merely refused to pay for them. Had they been forbidden outright, the opinion made clear, the dissenters would agree that standing should be found:

> "The principle [which *Griswold, Doe* v. *Bolton,* and *Danforth* v. *Planned Parenthood of Missouri*] support turns not upon the confidential nature of a physician-patient relationship, but upon the nature of the State's impact upon that relationship. In each instance the State directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures. In the circumstances of direct interference, I agree that one party to the relationship should be permitted to assert the constitutional rights of the

> other, for a judicial rule of self-restraint should not preclude an attack on a State's proscription of constitutionally protected activity." —— U.S. at ——, ——, 96 S. Ct. at 2877, 2880-81.

The latter opinion thus describes the present situation exactly; the State of New York has directly prohibited certain activity, by defining it as criminal activity. No judicial rule of self-restraint should be imposed, which would stand in the way of the present attack on the State's proscription of activity which is entitled to the full protection of the Constitution.

Accordingly, the holding of the District Court should be affirmed in finding standing for the Appellees PPA and Hagen.

POINT II

The constitutional guarantee of personal privacy includes the fundamental right to obtain and have access to nonprescription contraceptives.

It is now clear beyond peradventure that under the Constitution there exists a zone of personal privacy protecting the right of any citizen to make fundamental personal decisions concerning procreation without improper governmental intrusion. This Court has made it manifestly plain that there is a constitutional privacy right which encompasses activities relating, *inter alia,* to the use of contraceptives and the right to obtain and to have access to such products. See *Roe* v. *Wade,* 410 U.S. 113, at 152-153 (1973).

Indeed, the modern judicial development of the concept of privacy as a right guaranteed by the Constitution began with this Court's decision in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), which concerned a state statute forbidding the use of contraceptives by all persons, and which overturned the statute as violative of the constitutional right to marital privacy. *Griswold* held that an implicit privacy right emanated from the First, Third, Fourth, Fifth and Ninth Amendments. The privacy right thus found was held to protect associational concepts, the sanctity of the home, and the marital relationship. This right was sufficient to invalidate Connecticut's prohibition on the use of contraceptives by married couples.[6]

The decade following *Griswold* has been one in which this Court and the lower federal courts have steadily widened their recognition of the constitutional privacy right, to allow the individual autonomy in the most intimate phases of personal life, having to do with sexual intercourse and its consequences, an area which plainly includes the right to distribute and to have access to contraceptives.

In *Eisenstadt* v. *Baird, supra,* the Court examined and found unconstitutional a Massachusetts statute which "merely" regulated access to contraceptives but which did not impose any penalties for contraceptive use. The statute at issue prohibited the distribution of all contraceptives to unmarried persons, and required even in the case of

[6] The Appellants mistakenly assert that the *Griswold* opinion holds that a state statute which "simply" regulates the manufacture or sale of contraceptives will withstand constitutional scrutiny (Appellants' Brief, p. 13). On the contrary, as Mr. Justice White stated in his concurring opinion in *Eisenstadt* v. *Baird,* 405 U.S. 438, at 461 (1972), the Court in *Griswold* "expressly left open any question concerning the permissible scope" of legislation regulating the manufacture or sale of contraceptives.

married persons that all contraceptives be obtained from a physician or from a licensed pharmacy with a doctor's prescription. A plurality of the Court held that the distinction between married and unmarried persons, where contraceptives were concerned, violated the equal protection clause of the Fourteenth Amendment.

Mr. Justice Brennan's plurality opinion made it apparent that the privacy right enunciated in *Griswold* would not be limited to the marital relationship, and would extend to all persons on an individual basis, stating:

> "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.*" 405 U.S. at 453. (Emphasis supplied.)

Since the Court in *Eisenstadt* found the Massachusetts statute to be irrational, on traditional equal protection grounds, it was not necessary to decide whether a statute impinging upon the right of access to contraceptives violated a fundamental freedom included within the right of privacy, which would subject it to the stricter scrutiny of the "compelling state interest" test. 405 U.S. at 447, fn. 7.

But this question, left unanswered in *Eisenstadt,* was answered affirmatively and clearly in *Roe* v. *Wade, supra,* where the Court held that a woman's right to terminate her pregnancy was a "fundamental" constitutional right, and therefore subject to regulation only on the basis of a "compelling state interest"—an interest which was found not to exist during the first trimester of pregnancy. At the same time, the Court made it clear that activities relating to contraception (activities which of necessity must include access to and distribution of contraceptives) were fundamental rights, requiring that a compelling state interest be shown before they could be burdened by the State.

> "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967), procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942), *contraception,* Eisenstadt v. Baird, 405 U.S. 438, 453-454 (1972); id. at 460, 463-465 (White, J., concurring in result), family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska [262 U.S. 390 (1923)]." 410 U.S. at 152-153. (Emphasis supplied.)

See also *Doe* v. *Bolton,* 410 U.S. 179 (1973); *Paris Adult Theater I* v. *Slaton,* 413 U.S. 49, at 65 (1973); and Note, *On Privacy, Constitutional Protection for Personal Liberty,* 48 N.Y.U. L. Rev. 670, 706, n. 221 (1973) [hereinafter

Note, *On Privacy*], wherein it is suggested that the Court's subsequent references to the *Eisenstadt* decision indicate a recognition that that case extended the coverage of the privacy right to access to contraceptives.[7]

In light of this Court's decisions in *Griswold, Eisenstadt* and *Roe* v. *Wade,* those lower federal courts faced with the question of whether access to contraceptives is a fundamental right protected by constitutional privacy have all concluded that it is.

For example, the Court of Appeals for the Second Circuit, in *Roe* v. *Ingraham,* 480 F.2d 102 (2d Cir. 1973), strongly stated its view that access to and distribution of contraceptives was constitutionally protected. The Court held as follows:

> "That decision [Griswold v. Connecticut] along with Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed.2d 349 (1972), can be viewed as forecasting recognition of a constitutional right of men and women to decide, free of governmental interference, whether to minimize the risks of conception from sexual intercourse, although *Griswold* focused on the provision of the Connecticut statute proscribing the *use* of contraceptives and the attendant horrors of enforcement in the case of married persons, 381 U.S. at 485-486, 85 S. Ct. 1678, and *Eisenstadt* was rested on the equal protection clause." 480 F.2d at 107. (Emphasis in original.)

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[7] See also *Runyon* v. *McCrary,* — U.S. —, 96 S. Ct. 2586, at 2598 (1976), in which Mr. Justice Stewart, for the Court, after referring to *Griswold* and *Roe,* stated that the "government is largely or even entirely precluded from regulating the childbearing decision. . . ".

In *T—H—* v. *Jones,* —— F. Supp. ——, C-74-276 (D. Utah July 23, 1975), *aff'd* on other grounds, —— U.S. ——, 96 S. Ct. 2195 (1976), a three-judge court invalidated a state regulation which barred distribution of contraceptives to minors without parental consent, and after reviewing *Griswold, Eisenstadt,* and *Roe,* held that the right of privacy included the right to have access to contraceptives, stating:

> "If, as *Roe* teaches, the fourteenth amendment protects a woman's right to decide whether she will terminate her pregnancy, it must also, we believe, protect her right to take measures to guard against pregnancy. In either instance the woman's interest is the same, that is, to make fundamental personal decisions about sexual conduct and procreation free from state interference. We are convinced, therefore, that the right to privacy underlying the Supreme Court's decision in *Roe* v. *Wade* prevents the state from intruding, without justification, into the decision of adults whether to obtain and use contraceptive devices and whether to seek out counseling in family planning matters." Slip Opinion, at p. 11.

See also *Baird* v. *Lynch,* 390 F. Supp. 740, at 749-50 (W.D. Wis. 1974) (three-judge court); *Associated Students, U. of Cal. at Riverside* v. *Attorney General,* 368 F. Supp. 11, at 22 (C.D. Cal. 1973) (three-judge court).

In determining, in *Roe* v. *Wade, supra,* that the abortion decision was fundamental, this Court looked to the harm that would befall the women affected if the State were permitted to preclude the woman's free choice not to bear a child.

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved." 410 U.S. at 153.

Similar adverse effects, and other dire consequences as well, are likewise visited upon substantial numbers of adult and minor men and women in New York by the statute here at issue, which in effect prescribes all of the potential risks of out-of-wedlock birth, unwanted pregnancy and venereal disease, and denies the freedom of personal privacy.[8]

Obviously, the right of access to contraceptives is essential to the exercise of the right to use contraceptives, and therefore must similarly be found fundamental and an aspect of the privacy right.[9] Individuals do not have an effective right to use contraceptives unless they have access

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[8] That such unfortunate consequences result directly from the continued enforcement of this statute is amply documented; see Point IV, *infra,* and particularly text following fn. 17.

[9] See Note, *On Privacy, supra,* at 706-707; Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy;* 88 HARV. L. REV. 1001, at 1006 (1975).

to them and to information concerning them. Since recognition of a hollow, meaningless right can hardly have been the Court's intention, it is clear that the Court meant, when it recognized the right of contraceptive use, to recognize the full spectrum of rights which would make the principal right meaningful. This premise was made clear in *Griswold* when it was declared that specific constitutional rights are insured only by the protection of various peripheral rights, for "without these peripheral rights, the specific rights would be less secure." 381 U.S. at 482-483. In *Griswold* and *Eisenstadt,* this Court implictly recognized the closely interrelated nature of the right to use and the right to access, by granting standing to represent the rights of *users* of contraceptives to those who in fact provided *access* to contraceptives. Thus, inherent in each of these decisions explicating the right to privacy, is the recognition that the broad reach of the personal privacy right encompasses the right of access to contraceptive devices and to information concerning them.[10]

Since the right to obtain and to have access to contraceptives has been unequivocally recognized as a fundamental right, a regulation such as the New York statute challenged by Appellees, which seeks to abridge that right, may be justified only by a "compelling state interest." Further, it is also the State's burden to demonstrate that

[10] Analogous findings were made in *Roe* v. *Wade* and *Doe* v. *Bolton,* in which it was held unconstitutional to prosecute doctors for performing abortions. Had the Court there found a disjuncture between the right to abortion and the right of access to abortion, it would have upheld laws under which doctors were prosecuted, and struck down only those under which pregnant women were prosecuted. It would be anomalous for this Court now to hold with regard to contraceptives that users may not be prosecuted but distributors may.

the statute in question is sufficiently narrowly drawn so as to serve only such legitimate state interests as are in fact present. See *Roe* v. *Wade, supra; Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Eisenstadt* v. *Baird, supra; Griswold* v. *Connecticut, supra; Lopez* v. *Wyman,* 329 F. Supp. 483 (W.D.N.Y. 1971), *aff'd* 404 U.S. 1055 (1972).[11]

While Appellees believe they have demonstrated that the rights here at issue are fundamental, and therefore require application of the test of compelling state interest, the statute must fall even if reviewed by the so-called "intermediate" test as applied by the three-judge court. See *Boraas* v. *Village of Belle Terre,* 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds,* 416 U.S. 1 (1974). That test requires that a statute be "carefully scrutinized" if it infringes upon a personal right; it may stand only if closely related in fact to a legitimate state interest. 476 F.2d at 814-815. See also *Reed* v. *Reed,* 404 U.S. 71 (1971); *Eisenstadt* v. *Baird, supra.* The three-judge court correctly found that Education Law §6811(8) could not meet even this lesser test of close relationship since it furthers no conceivable

[11] The Appellants contend (Appellants' Brief, p. 13) that *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973), requires this Court to find the right of access to contraceptives not to be fundamental, but their contention is misplaced. The Court determined in *Rodriguez* that "education" was not a fundamental right, but recognized that the required standard of review for equal protection analysis was conditioned upon the fundamentality of the underlying interest. In *Rodriguez,* the Court acknowledged that "implicit" constitutional rights can be equal in dimension to "explicit" rights. In any event, as demonstrated, the individual's interest in sexual intercourse and its consequences and in procreation has been judicially recognized as a fundamental right.

state interest; thus the question of whether access to contraceptives is fundamental was not reached.

In the instant case, the result is the same whether the strict "compelling interest" test, the intermediate "substantial relationship" test, or even the most lenient and uncritical "rational relationship" test is utilized: As will be shown, none of the statute's proscriptions can be found to have even the most tangential relationship to any legitimate state interest, and the statute must therefore be struck down in its entirety.

POINT III

The statutory prohibition of sale or distribution of nonprescription contraceptives by all persons other than licensed pharmacists unconstitutionally infringes the fundamental privacy right of access to contraceptives.

Insofar as the New York statutes makes criminal the sale or distribution of nonmedical, nonprescription contraceptives, other than through a licensed pharmacy, by a licensed pharmacist, it is not only not supported by any compelling state interest, but it is absolutely illogical to the point of irrationality.

The District Court found (J.S. 18a, 19a) that there was "no doubt" that the limitation on sale or distribution of nonprescription contraceptives to licensed pharmacists only was a "significant" restriction on the constitutional right of access to such products. The Appellants' persistence in arguing that this restriction "does not raise a serious issue" (Appellants' Brief, p. 14) surpasses the limits of the credible, and is not based upon any facts in the record. Clearly,

the number of pharmacies in New York State is minuscule when compared with the total number of retail outlets which properly sell and distribute all manner of nonprescription products. Certainly, in many cases—and particularly in thinly populated areas—there are other retail outlets more accessible to the consumer than the nearest pharmacy. There are occasions, of course, such as nights and holidays, when the local pharmacy may be closed but another outlet open. Another factor, ignored by Appellants, is that a choice of retail outlets other than pharmacies would spare the purchaser the embarrassment which may deter him or her from purchasing such products at the local drugstore, and would provide a greater opportunity for privacy of selection and purchase.[12] Further, it would seem apparent that the State-created grant of a monopoly on sale or distribution of nonprescription contraceptives to pharmacists keeps the retail price of these products artificially high. In the absence of normal competition, this law prevents prices of contraceptives from seeking natural open-market levels. The above stated factors are but some of the more obvious ways in which the statute's "pharmacists only" restriction hinders the right of access to contraceptives.

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[12] As noted by Ellin Massey, the director of the Nassau County Coalition for Family Planning,

> "Pharmacists, who are in the front line of delivery of family planning services, frequently refuse to sell nonprescriptive contraception materials, such as foam or condoms, to young people of either sex, and often if teenagers are not refused outright, they are made to feel embarrassed or given a lecture on 'morality.' The law presently permits the sale of contraceptive devices to everyone regardless of age, but this is ignored by many pharamcists who are concerned about the present climate regarding family planning in the county, as well as possible repercussions from the community." Massey, *Nassau Family-Planning Crisis*, New York Times, August 8, 1976, Section 11 (Long Island Weekly) at p. 18.

This provision limiting sale and distribution of nonmedical contraceptives to pharmacists may not be justified as a "health" measure since no one can be harmed by the use of such products. Its purpose and effect are rather to restrict the use of contraceptives, for reasons which Appellants admit have nothing to do with public health.

The Appellees do not challenge the power of the State to restrict in a proper fashion those contraceptives requiring a prescription, such as birth control pills, intrauterine devices and diaphragms, to sale or distribution by licensed pharmacists. Indeed, such restrictions are properly imposed not only by the State, but by the United States Food and Drug Administration. See 21 U.S.C. §§331 *et seq.* Where, however, the commodity in question is, as here, a small inert plastic or rubber sleeve which poses no health hazard, and which does not require a prescription, a requirement limiting sale to pharmacists is irrational.

In *Baird* v. *Eisenstadt,* 429 F.2d 1398 (1st Cir. 1970), *aff'd* 405 U.S. 438 (1972), the Court of Appeals for the First Circuit and the Supreme Court took judicial notice that many contraceptive devices, including, specifically, the condom, present no risk of dangerous health consequences. In this regard, the First Circuit stated:

> "In addition, we must take notice that not all contraceptive devices risk 'undesirable • • • [or] dangerous physical consequences.' It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a 'redingote anglais.' The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the

> legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. • • • [W]e may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless." 429 F.2d at 1401.

In affirming the decision of the First Circuit in *Eisenstadt,* Mr. Justice Brennan's plurality opinion joined in this finding "in noting that not all contraceptives are potentially dangerous." 405 U.S. at 451. The concurring opinion of Justices White and Blackmun went even further, and would have granted relief solely on the ground that the Massachusetts statute, by placing a medical restriction on a non-hazardous product ("Emko" vaginal foam), unconstitutionally burdened the fundamental right of distribution and use of contraceptives. Justices White and Blackmun stated as follows:

> "Just as in Griswold, where the right of married persons to use contraceptives was 'diluted or adversely affected' by permitting a conviction for giving advice as to its exercise, [381 U.S.] at 481, *so here, to sanction a medical*[13] *restriction upon distribution of a contraceptive not proved hazardous to health would impair*

[13] Appellants assert that §6807(b) of the New York Education Law allows physicians to distribute nonprescription contraceptives to their patients, regardless of age. Appellees dispute this interpretation of the statute. The three-judge court did not decide this question. Rather, it assumed, for the purpose of ruling on the "pharmacists only" and "minors" restrictions, that doctors could dispense nonmedical contraceptives. Nevertheless, it held these provisions constitutionally infirm.

the exercise of the constitutional right." 405 U.S. at 464. (Emphasis supplied.)

Since the provision limiting sales and distribution of nonmedical contraceptives to licensed pharmacists cannot possibly be demonstrated to be a valid health measure,[14] it is patently overbroad. The justifications put forth by the Appellants in support of the validity of this provision are of the flimsiest character when balanced against the fundamental nature of the rights infringed. Appellants posit that the provision is justified by administrative convenience, by the need to have knowledgeable persons dispensing contraceptives, by a need for quality control, and by a concern that young people not sell contraceptives (Appellants' Brief, pp. 9, 14).[15] The first of these, administrative convenience in enforcing the remainder of the statute, is clearly inapposite, because the entire statute is unconstitutional. Moreover, as the court below found, even if the other provisions were valid, there is no perceptible reason why pharmacists can better limit sale to young persons or prevent advertising and display than other storekeepers. Even

[14] The cruel paradox of the New York law is that it is in fact an *anti*-health measure. By limiting access to condoms—an effective preventive measure against syphilis and gonorrhea—this law contributes to the spiraling epidemic of venereal disease and the increase of unwanted births to female adolescents. See S. GORDON, THE SEXUAL ADOLESCENT, 81-91 (Duxbury Press, 1973); see also REPORT OF THE NATIONAL COMMISSION ON VENEREAL DISEASE (U.S. Government Printing Office, 1972); POPULATION AND THE AMERICAN FUTURE: REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE (New American Library, 1972); E. MOORE AND H. WILSON, CHILDREN BEARING CHILDREN (Institute for Suburban Studies of Adelphi University and Nassau County Coalition for Family Planning, 1976).

[15] This novel suggestion of a state interest that young people not sell such products was neither asserted in any of Appellants' prior memoranda, nor considered in the court below.

if they could, mere considedrations of administrative convenience here are not so weighty as to permit infringement of constitutional rights. *See*, e.g., *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Id.* at 41-44 (Burger, C.J., concurring); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Almenares* v. *Wyman*, 334 F. Supp. 512 (S.D.N.Y.), *aff'd as modified*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

The Appellants have wholly failed to provide any demonstrable or rational reason why a person with the knowledge and background of a pharmacist is needed to sell or distribute these nonprescription items, as opposed to the numerous other proprietary products dispensed by the normal panoply of purveyors. Moreover, in light of the display ban, the prospective purchaser of contraceptives could gain little knowledge of the varying brands of products by inquiring of the pharmacist. In any event, advice as to types or brands of nonmedical contraceptives hardly seems necessary since most of the products differ from each other only in price, See GORDON, THE SEXUAL ADOLESCENT, *supra*, at 57.

This provision may not alternatively be upheld as a control on quality. These products are not compounded or manufactured by the pharmacist, but arrive pre-packaged, and the pharmacist has no more control over quality than any other retailer would have, nor does he have any more control over quality of these products than he does over the quality of the toothpastes he sells.[16] In any case, quality control of these products is accomplished by the Federal

[16] The Appellants have not asserted that it is now the practice or likely to become the custom that the pharmacist would remove each nonmedical contraceptive from its sealed container and inspect it or test it prior to delivery to the purchaser. Indeed, if such

government, 21 U.S.C. §321(h), and the Food and Drug Administration has and exercises the power to set standards and to test contraceptives and seize those which fail to measure up.

Finally, the statute is far too overbroad as a means of preventing young persons from *selling* contraceptives. There are much narrower ways of accomplishing the same goal, such as legislating as to the required age of sellers of contraceptives. When it is permissible at all to burden the exercise of a constitutional right, the least restrictive alternative must of course be used. See, e.g., *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974); *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

Plainly, none of these purported justifications supports this provision of the statute. Since it is a significant burden on the fundamental right to have access to and to obtain contraceptives, and is unjustified even by any rational, much less a compelling reason, it is patently in violation of the Ninth and Fourteenth Amendments to the United States Constitution.

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inspections were necessary for quality control, they could be accomplished more narrowly at the level of the wholesaler or manufacturer, thereby reducing the burden on the exercise of a constitutional right.

POINT IV

The statutory proscription against sale or distribution of nonprescription contraceptives to minors under the age of sixteen is an improper denial of the fundamental right of privacy and a violation of the right to equal protection as guaranteed by the Fourteenth Amendment.

The right to use and to have access to contraceptives which this Court has clearly spelled out in *Griswold* v. *Connecticut, Eisenstadt* v. *Baird, Roe* v. *Wade* and *Doe* v. *Bolton,* all *supra,* cannot be denied to minors even under the guise of protecting them. It is hornbook law that children do not stand outside of the protections of the Constitution, and that they are not disenfranchised from fundamental constitutional guarantees such as the right of privacy. A State may not excise a child's constitutional prerogatives upon the grounds of misguided paternalism or, as is urged by Appellants here, to "regulate morality" (Appellants' Brief, p. 15).

In *Planned Parenthood of Central Missouri* v. *Danforth,* —— U.S. ——, 96 S. Ct. 2831 (1976), the Court put to rest the Appellants' argument that because "minority as a classification has always had judicial sanction" (Appellants' Brief, p. 16), the State may constitutionally deny minors under sixteen access to contraceptives. In holding that minors were protected by the constitutional privacy right and thereby declaring unconstitutional a Missouri statute which required the written consent of a parent before an abortion could be performed on an unmarried woman under the age of eighteen, Mr. Justice Blackmun stated:

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, *e.g., Breed* v. *Jones,* 421 U.S. 519 (1975); *Goss* v. *Lopez,* 419 U.S. 565 (1975); *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969); *In re Gault,* 387 U.S. 1 (1967)." 96 S. Ct. at 2843.

See *Bellotti* v. *Baird,* —— U.S. ——, 96 S. Ct. 2857 (1976); *T—H—* v. *Jones, supra; Poe* v. *Gerstein,* 517 F.2d 787 (5th Cir. 1975), *aff'd sub nom. Gerstein* v. *Coe,* —— U.S. ——, 96 S. Ct. 3202 (1976); *Planned Parenthood Association* v. *Fitzpatrick,* 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd sub nom. Franklin* v. *Fitzpatrick,* —— U.S. ——, 96 S. Ct. 3202 (1976); *Doe* v. *Rampton,* 366 F. Supp. 189 (D. Utah 1973); *Wolfe* v. *Schroering,* 388 F. Supp. 631 (W.D. Ky. 1974); *Foe* v. *Vanderhoof,* 389 F. Supp. 947 (D. Colo. 1975); *State* v. *Koome,* 84 Wash. 2d 901, 530 P.2d 260 (1975) (En Banc).

The need for recognition of a minor's privacy right of access to contraceptives is particularly compelling. In determining that a woman's decision to terminate her pregnancy was a fundamental privacy right, this Court, in *Roe* v. *Wade, supra,* 410 U.S. at 153, enunciated a standard which considered the need for the right and the consequences of its denial. The detrimental factors mentioned by the Court in *Roe*[17] are all present in even a more aggra-

[17] As already noted (See POINT II, *supra*), these include "Specific and direct harm medically diagnosable even in early pregnancy;" the fact that "[m]aternity or additional off-spring may force upon the woman a distasteful life and future;" the possibility of imminent psychological harm; the fact that the woman's "[m]ental and physical health might be taxed by child care;" "the distress,

vated fashion, and with greater force, when the State puts limits on access to contraceptives for sexually active minors.

This Court may note, as did the three-judge court (J.S. 15a-16a) that "some young persons under the age of sixteen, including some in New York State do engage in sexual intercourse and that the consequence of such activity is often venereal disease, unwanted pregnancy or both." Indeed, in a national survey of a sample of unmarried females aged 15-19, drawn from all income levels throughout the United States, sexual experience was reported by over 13% of the 15-year olds, with the proportion rising for each additional year of age to 46% among the 19-year olds. J. Kanter and M. Zelnick, *Sexual Experiences of Unmarried Women in the United States,* 4 FAMILY PLANNING PERSPECTIVES 9 (1972). More recent studies indicate that the percentage of sexually active unmarried females aged 15-19 has increased from 28% in 1971 to 36% in 1973, with the largest percentage increase (over 70%) being among 15-year-olds. J. Dryfoos, *Women Who Need and Receive Family Planning Services: Estimates at Mid-Decade,* 7 FAMILY PLANNING PERSPECTIVES 174 (1975).

By limiting access to contraceptives for minors who engage in sexual intercourse, the Appellants confront teenage women and men, while still children themselves, with the awesome responsibilities of parenthood. More and more often, the teenager ends up with an abortion or an un-

for all concerned, associated with the unwanted child;" "[t]he problem of bringing a child into a family already unable, psychologically and otherwise, to care for it;" and "the additional difficulties and continuing stigma of unwed motherhood." 410 U.S. at 153.

wanted child. See E. Moore and H. Wilson, *Children Bearing Children* (Institute for Suburban Studies of Adelphi University and Nassau County Coalition for Family Planning, 1976), at pp. 2-4, a demographic study of the suburban New York county of Nassau, where the authors set forth the following data: 79% of sexually active teenagers do not use contraceptives regularly; the 15-19 year-old age group in Nassau County experienced a consistently rising number of pregnancies from 1971 to 1974; the premature birth rate is 80% higher for teenage mothers than for women 20 years or over; 50% of all births to teenage mothers in Nassau County occurred out-of-wedlock; 40% of all the unwed mothers in Nasasu County in 1974 were teenagers; abortions to teenagers in Nassau County increased by 45.9% from 1971 to 1974; almost 60% of teenage pregnancies in Nassau County in 1974 ended in abortion; only one teenage pregnancy out of five ended in a live, legitimate birth in Nassau County in 1974.

The disastrous medical, social, psychological and economic consequences which these statistics demonstrate, and which in large part result from this restrictive law, have been noted by many other commentators. *See, e.g.*, Paul, Pilpel and Wechsler, *Pregnancy, Teenagers and the Law, 1974*, 6 Family Planning Perspectives, 142, at 144 (1974); Note, *A Minor's Right to Contraceptives*, 7 U. Cal. Davis L. Rev. 270 (1974); Mencken, *The Health and Social Consequences of Teenage Childbearing*, 4 Family Planning Perspectives 45 (1972); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 Harv. L. Rev. 1001, at 1009-1010 (1975). As the Commission on Population Growth and the American Future (created by Congress and appointed by former

President Nixon, points out in its published report, Population and the American Future, at 145 (New American Library ed., 1972):

> "Out-of-wedlock births among people aged 15 to 19 are increasing in the United States. In 1965, there were 125,000 children born to unwed teenage mothers; in 1968, the figure rose to 160,000. By 1970, the figure is estimated to have risen to 180,000. The proportion of out-of-wedlock births among 15- to 19- year olds rose from 15 percent in 1960 to 27 percent in 1968.
>
> "Unwed mothers are less likely than married mothers to have adequate prenatal care; and children born out of wedlock are more likely to be born prematurely and to die in the first year after birth. Adequate provision of contraceptive information and services, regardless of age, marital status, or number of children, is likely to reduce rates of out-of-wedlock pregnancy."

It is thus apparent that the interest of minors in access to contraceptives is one of fundamental importance, and is equal in every regard to the privacy rights accorded to adults. The burden therefore falls upon the Appellants, to justify the provision limiting minors' access to contraceptives by showing a compelling State interest, and to show that the legislation is narrowly drawn to serve only the legitimate State interest thus demonstrated. The Appellants have wholly failed to make this required showing, or even to demonstrate that the statute is rationally related to any proper goal.

The sole reason proferred by Appellants in support of the State's infringement of the minors' constitutional right of access to contraceptives is "expressing societal disap-

proval of sexual activity by pre-teenagers and those in their early teens" (Appellants' Brief, p. 9). The Appellants thus argue that the deterrence of teenage sexual conduct (whether licit or illicit they do not always make clear) is the compelling State interest behind the statute.

Even if the Court were to assume *arguendo* that the State could regulate the morals of minors in this regard (a proposition which Appellees strongly dispute), the statute would still be constitutionally infirm since there is no rational relation between the restriction of the constitutional right and the subject of State concern here—teenage morality. Contrary to the unsupported assertions of the Appellants, *raised for the first time in this Court,*[18] There is no evidence that teenage sexual conduct increases in proportion to the availability of contraceptives. In point of fact, the data leads overwhelmingly to the conclusion that contraceptive availability does not lead to increased sexual activity. See Settlage, Baroff & Cooper, *Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance For The First Time,* 5 FAMILY PLANNING PERSPECTIVES 223 (1973); Pilpel & Wechsler, *Birth Control, Teenagers*

[18] It is to be observed that the Appellants' contention that increasing availability of contraceptives increases teenage sexual activity (Appellants' Brief, p. 21) was not argued by the State in any of the proceedings before the three-judge court. Indeed, as noted in the decision of the three-judge court (J.S. 15a), the State in a Memorandum of Law, submitted to that Court, conceded that "there is no evidence that teenage extramarital activity increases in proportion to the availability of contraceptives * * * ." (Appellants' Memorandum of Law dated August 1, 1974 at p. 23). The opposite contention, now submitted by the State without any support in the record, is inconsistent with the theory which it put before the three-judge court and for that reason alone, it is not properly presented here. See *Cort* v. *Ash,* 422 U.S. 66, at 72 n. 6 (1975); *Rondeau* v. *Mosinee Paper Corporation,* 422 U.S. 49, at 61 n. 11 (1975); *Neely* v. *Eby Construction Co.,* 386 U.S. 317 (1967).

and the Law: A New Look, 1971, 3 FAMILY PLANNING PERSPECTIVES 37 (1971); Stein, *Furnishing Information and Medical Treatment to Minors for Prevention, Termination and Treatment of Pregnancy,* 5 CLEARINGHOUSE REVIEW 131, at 152 (1971); I. L. Reiss, *Contraceptive Information and Morality,* 2 JOURNAL OF SEX RESEARCH 51 (1966).

The statute therefore plainly lacks a fair and substantial relationship to a legitimate State objective.[19]

Thus, in order to promote some abstract notion of morality, the Appellants are willing to visit upon thousands of minor citizens, the terrible harvest of tragedy and despair which are the real consequences of this enactment. Where, as has been shown, the restriction imposed by the State harms the minor and the removal of that restriction would be of benefit, the law can hardly be claimed to have any constitutionally sufficient justification for its existence. In such circumstances, the blanket assertion of "regulating morality" cannot suffice. Indeed, there is room for doubt whether the State enjoys any legitimate interest in maintaining legislation of this character for the purpose of fostering a particular moral climate. In *Roe* v. *Wade,*

[19] The three-judge court also noted "the existence of substantial statutory exceptions" to the provision prohibiting distribution of contraceptives to minors under the age of sixteen (J.S. 16a). Reference was made in particular to Section 350(1)(e) of the New York Social Services Law, implementing the federal program of aid to needy families with dependent children, which obliged the State to provide family planning services and supplies to eligible sexually active children, regardless of age. See also New York Social Services Law §365-a(3)(c).

Additionally, under the New York Domestic Relations Law, §15-(2)-(3), a woman at age fourteen may be married. Surely, it is incongruous that any such person, once married, could then have limits placed upon her right to make a private, marital decision as to whether to bear a child.

supra, where the plaintiff was an unmarried, pregnant woman, the Court omitted any reference to a justifiable state interest in deterring illicit sexual conduct. After noting in *Roe* that Texas did not offer this rationale as a justification for its anti-abortion statute, Mr. Justice Blackmun observed that "it appears that no court or commentator has taken the argument seriously." 410 U.S. at 148. See also *Poe* v. *Gerstein, supra,* 517 F.2d at 792; *Baird* v. *Lynch, supra,* 390 F. Supp. at 751; Note, *On Privacy, supra,* at 719-738; Note, *Parental Consent Requirements and Privacy Rights of Minors*: *The Contraceptive Controversy, supra,* at 1011.

The effect of this statute is to attempt to deter teenage sexual conduct by potentially punishing fornication with venereal disease, with pregnancy, illegitimate birth or abortion. The Court has already recognized that a State cannot punish "immoral conduct" in this fashion. In *Eisenstadt* v. *Baird, supra,* it was ruled that a statute banning distribution of contraceptives to all unmarried persons could not be supported by any purported rationale of deterring premarital sex. What Justice Brennan wrote in that case is equally pertinent to the New York restriction on distribution of contraceptives to minors:

> "It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication • • • . Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proferred objective." 405 U.S. at 448.

Since the results of the New York statute are precisely those condemned by Justice Brennan, it is patently an unconstitutional abridgement of the privacy rights of minors.

Many of the arguments offered by Appellants in a grab-bag fashion to support the restriction on access to contraceptives for minors are so lacking on their face as to warrant little or no comment. The State's contention that the age limitation in this statute must be upheld because if the State could not classify people by age, children would be voting and drinking and handling obscene materials, is baseless and irrelevant (Appellants' Brief, p. 16). Statutes aimed at the prevention of those activities which might conceivably be harmful to children, or society, are quite different from statutes aimed at withholding the use of products which prevent harm to children or society. Education Law §6811 is a statute of the latter type, and it is therefore a denial of privacy rights and of equal protection to minors because it prevents them from minimizing the harm that may come to them and to society if they engage in sexual intercourse.

Appellants' tortured assertion that the restriction of contraceptive access for minors is not a factor in lack of contraceptive use by teenagers is preposterous, and is unsupported even by Appellants' own limited evidence. They refer to R. C. Sorensen, Adolescent Sexuality in Contemporary America—Personal Values and Sexual Behavior Ages 13-19 (1973) (Appellants' Brief, p. 18); this study has been severely criticized by demographic experts because its sample of adolescents was unrepresentative. See J. F. Kantner, 5 Family Planning Perspectives, pp. 124-125 (1973), in which Kantner notes that, because of the skewed sample, the survey is, at best, inconclusive. The

other study relied upon by Appellants, S. N. SCHOFIELD, THE SEXUAL BEHAVIOR OF YOUNG PEOPLE (1965), was based upon interviews with adolescents in London, England—a fact not disclosed in Appellants' brief. Such a study patently has no application whatsoever in New York or in the United States due to vastly different populations and other demographic factors.[20]

In addition to its clear infringement upon the privacy rights of minors, this statute is plainly violative of the Equal Protection clause of the Fourteenth Amendment. No fair and substantial basis exists for differentiating between persons over and under the age of sixteen with respect to access to contraceptives. Adolescents under the age of sixteen, like adults, engage in sexual intercourse and are capable of conceiving children, contracting venereal disease or having an abortion. As demonstrated, minors risk greater detriments from intercourse without contraception than do adults. The artificial age limitation is irrational because it fails to take into account emotional and intellectual maturity. Cf. *Bellotti* v. *Baird, supra.*

In sum, it is crystal clear that no constitutionally adequate justification whatever exists for denying nonmedical contraceptives to minors. Such denial jeopardizes the minor's health and does not deter him or her from sexual activity. In the light of the demonstrated present day

[20] Appellants' reference (Appellants' Brief, p. 20) to A. ETZIONI, GENETIC FIX, 162-164 (1973) is patently misleading. The language Appellants refer to in describing the Etzioni study ("current technology offers no contraceptive device that fully meets the standards of acceptability, effectiveness and safety") is taken verbatim from Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, supra,* at 1007, n. 40. Appellants omit, however, the statement of the Note's author that "on balance, these risks are relatively slight."

realities, the anachronistic notion of regulating morals reflecting the Comstockian mores of a prior era, is without substance. That the dangers of potential pregnancy, abortion, illegitimate birth and venereal disease are imposed upon minors by the State of New York merely because they are under sixteen, and despite the fact that they are known to engage in sexual conduct disregarding the risk of these dangers, is unconscionable, and a violation of the constitutional rights of privacy and equal protection. The State has not even a rational interest, much less a compelling one, which can support such a violation of the fundamental constitutional right of a minor to have access to and to obtain and use contraceptives.

POINT V

The complete suppression of display or advertisement of nonmedical contraceptives is an unconstitutional prior restraint in violation of the First Amendment as well as an unconstitutional burden upon the protected right to use and to have access to such products.

The New York law places an absolute ban on display or advertisement of all contraceptives, including nonmedical contraceptives. Any violation of this provision is a Class A misdemeanor, subjecting the offending advertiser or displayer to a prison term of up to one year and/or a fine not exceeding $1000 (New York Penal Law, §§70.15, 80.05). New York has thus undertaken to "contract the spectrum of available knowledge," *Griswold* v. *Connecticut, supra,* 381 U.S. at 482, and to suppress the flow of information which would enable individuals to deal with "matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt* v. *Baird, supra,* 405 U.S. at 453.

This statutory prior restraint of free speech and expression bears a "heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, at 70 (1963); *New York Times Co.* v. *United States,* 403 U.S. 713, at 714 (1971); *Freedman* v. *Maryland,* 380 U.S. 51, at 57 (1965); *Thomas* v. *Collins,* 323 U.S. 516, at 529-530 (1945); *Near* v. *Minnesota,* 283 U.S. 697 (1931). The State "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, at 419 (1971); *New York Times Co.* v. *United States, supra,* 403 U.S. at 714. Speech—such as that banned here—cannot be prohibited unless there is an immediate danger that the words used will directly and imminently bring about a substantive evil which the State may prevent. *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).

Appellants do not dispute that the statute here challenged is in fact a prior restraint. Instead, they seek to withdraw the speech thereby prohibited from the realm of the protection of the First Amendment by calling it "commercial." However, any remaining question as to whether there is a "commercial speech" exception to the First Amendment was swept aside by the Court in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* —— U.S. ——, 96 S. Ct. 1817 (1976), wherein it was held that a statute which prohibited prescription drug price advertising was unconstitutional. In *Virginia State Board of Pharmacy,* the Court answered clearly and unequivocally the question left open in *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809, at 825 (1975) ("[t]he precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate

or even prohibit").[21] The Court in *Virginia State Board of Pharmacy* squarely held that speech which did no more than advertise a commercial transaction was protected by the First Amendment, even though the advertiser's interest was purely economic.[22]

This statute, like the Virginia statute under scrutiny in *Virginia State Board of Pharmacy,* cannot survive constitutional review. Section 6811(8) of the New York Education Law is, like the Virginia statute, an improper attempt which "singles out speech of a particular content" and "completely suppress[es] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its . . . recipients." 96 S. Ct. at 1830, 1831. See also *Terry* v. *California State Board of Pharmacy,* 395 F. Supp. 94 (N.D. Cal. 1975),

[21] The advertising in this case is, of course, related to an activity —contraception—which the State cannot legitimately prohibit or improperly restrict. The prohibition against advertising or displaying nonmedical contraceptives denies to the Appellees their rights of free speech, their rights to carry out lawful associational and advocacy activities concerning the fundamental right to use and distribute contraceptives, and denies to New York residents the knowledge and information otherwise lacking, which is necessary to enable them to make an informed decision as to whether to bear children, thereby also impinging upon their First Amendment rights and privacy rights. *Griswold, Eisenstadt* and *Roe* v. *Wade,* all discussed *supra,* demonstrate that individuals have a fundamental right to privacy and personal choice in matters of sex and family planning. This right encompasses the decision regarding whether to use contraception for family planning, and what types or methods of contraception to use. As the Court held in *Bigelow* v. *Virginia, supra,* commercial advertisements relating to a fundamental privacy right cannot be banned by the State.

[22] Thus, the conclusion of the three-judge court (J.S. 35a) that the advertisements placed by Appellee Population Planning Associates were purely commercial speech and not constitutionally protected is erroneous and in conflict with this Court's holdings in the *Bigelow* and *Virginia State Board of Pharmacy* decisions.

aff'd, —— U.S. ——, 96 S. Ct. 2617 (1976); *California Citizen Action Group* v. *Dept. of Consumer Affairs*, 407 F. Supp. 1075 (C.D. Cal. 1975), *vac. and remanded sub nom. California State Board of Optometry* v. *California Citizen Action Group*, —— U.S. ——, 44 U.S.L.W. 3702 (1976); *Pennsylvania State Board of Pharmacy* v. *Pastor*, 441 Pa. 186, 272 A.2d 487 (1971); *Anderson, Clayton & Co.* v. *Washington State Dept. of Ag.*, 402 F. Supp. 1253 (W.D. Wash. 1975); *Mitchell Family Planning, Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972); *Atlanta Co-Op News Project* v. *United States Postal Service*, 350 F. Supp. 234 (N.D. Ga. 1972) (three-judge court).

The instant case is surely one which, under any relevant criterion, requires that the challenged total ban on advertising of contraceptives be declared unconstitutional. The advertising here concerns a fundamental constitutional right, as did that in *Bigelow*. Appellees' concern is that all persons receive the knowledge that will enable them to exercise their constitutional right of privacy.[23] Moreover, there is no State interest which is sufficiently compelling, rational or even legitimate, which is substantially related to the suppression of information regarding contraceptives.

[23] As stated in the REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *supra*, at p. 168:

> "One way or another, these laws inhibit family planning programs and/or impinge on the ready availability of methods of contraception to the public. By prohibiting commercial sales, advertising displays and the use of vending machines for nonprescription contraceptives, they sacrifice accessability, *education* and individual rights in the interest of some undefined purpose. Whatever the original justification for these laws, *their result is to prevent contraceptive information* and supplies from being easily obtainable in general and, in some instances, to make them unobtainable." (Emphasis supplied.)

In support of this complete censorship,[24] Appellants offer two purported State interests which are allegedly served by the ban on contraceptive advertising or display contained in Education Law §6811(8). One is that individuals not be exposed to purported embarrassment from such advertising and display. The other is that such advertising and display will lead to legitimization and increase of sexual activity among young people.

As to the first contention, it is sufficient to note that protected speech will not be rendered the less so because it is found offensive by some people. *Cohen* v. *California*, 403 U.S. 15 (1971); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, at 209 (1975). As to the State's second assertion of an interest in deterring promiscuity among the young, Appellants have presented no evidence whatsoever that any such result would occur, and it seems certain that if they could not show that actual access to contraceptives will increase sexual activity, it is not possible to conceive that they could show that information about contraceptives will lead to such an increase. Such unprovable assumptions cannot support the infringement of First Amendment or constitutionally protected privacy rights. The State might just as logically forbid the display or advertising of water beds, bikini bathing suits, perfumes and the like.

[24] Appellants' contention (Appellants' Brief, p. 26) that the statutory total bar on display and advertisement of nonmedical contraceptives is constitutionally valid because information about contraception is available from other sources is, of course, manifestly meritless. As this Court stated in *Virginia State Board of Pharmacy, supra*, 96 S. Ct. at 1823, n. 15: "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means • • • ."

Again, even if one were to assume that the State had a legitimate interest in regulating moral conduct of the young, this interest would hardly be sufficient to sustain the prior restraint and total ban on speech which the statute imposes. Because §6811(8) of the New York Education Law prohibits all advertisements or displays of contraceptives, irrespective of content, context, form or substance, it cannot be sustained by reason of any State interest relating to minors. As the Court stated in *Erznoznik* v. *City of Jacksonville, supra,* at 213-214, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." The well reasoned conclusion of the three-judge court in *Associated Students, U. of Cal. at Riverside* v. *Attorney General, supra,* 368 F. Supp. at 22, n. 3 (overturning the provision of the federal law which barred the mailing of unsolicited information about contraceptives), is apposite:

> "Any governmental interest in preventing the corruption of public morals cannot justify the infringement on the freedom of speech and the right to privacy that this statute entails. This is particularly so where, as here, the governmental interest that the statute is asserted to further is based upon a personal judgment on which there is a great divergence of views among the public." [25]

[25] Bills seeking to repeal Section 6811(8) of the Education Law have had the support of many organizations, inclding the New York State Council of Churches, the NAACP, the Union of American Hebrew Congregations, and Planned Parenthood of New York City, Inc. Indeed, the American Bar Association has adopted a resolution urging "that states eliminate existing restrictions on access to contraceptive information, procedures (including voluntary contraceptive sterilization) and supplies," and has recommended as part of that resolution that states "develop affirmative legislation which will permit minors to receive contraceptive information and services." 13 Crim. L. Rptr. 2438 (August 15, 1973).

Likewise, the claim made by the State in this case that the ban of display and advertisement of nonmedical contraceptives is supported by a proper governmental interest in regulating sexual behavior of younthful New York residents is erroneous.

Lastly, the statute is overbroad, as was found by the three-judge court. By its terms, it limits *any* publication of information regarding contraceptives, whatever the form and whoever the source. Thus, even if a statute could be written to regulate some contraceptive advertisements, this statute is clearly unconstitutional. See *Bigelow* v. *Virginia, supra; Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-12 (1973); *Dombrowski* v. *Pfister,* 380 U.S. 479, at 486 (1965); *Erznoznik* v. *City of Jacksonville, supra; Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 (1975).

New York's total suppression of advertisements or displays of nonmedical contraceptives is plainly repugnant to the First Amendment and therefore should be struck down.

CONCLUSION

Appellees respectfully submit that each provision of §6811(8) of the New York Education Law is unconstitutional and urge that this Court affirm the judgment of the three-judge court.

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Respectfully submitted,

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